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NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council
No. Cion doc.:	7222/18 + ADD 1 REV 1 + ADD 2 REV 1 + ADD 3
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the law applicable to the third-party effects of assignments of claims **(First reading)** - Progress report

I. INTRODUCTION

1. As part of the Capital Markets Union Action Plan, on 12 March 2018 the Commission presented the above-mentioned proposal[1], based on Article 81(2) (Judicial cooperation in civil matters) of the Treaty on the Functioning of the European Union and subject to the ordinary legislative procedure. The proposal is accompanied by a Communication from the Commission on the applicable law to the proprietary effects of transactions in securities[2] and an Impact Assessment[3]. The objective of the proposal is to increase cross-border transactions in claims and, thereby, facilitate access to finance.

1 7222/18 - COM(2018) 96 final
2 7358/18 - COM(2018) 89 final
3 7222/18 ADD1 REV 1 + ADD2 REV 1

2. The assignment of a claim refers to a situation where a creditor transfers the right to claim a debt to another person. At the moment, there is no legal certainty at EU level as to which national law applies when determining who owns a claim after it has been assigned in a cross-border case.

3. As a general rule, the Commission proposes that in conflict-of-law situations the law of the assignor's habitual residence should govern the third-party effects of the assignment of a claim. According to the Commission's assessment, one of the main advantages of this rule is that the applicable law is easy to predict, since the location of the assignor can be ascertained in advance by third parties. At the same time, the Commission proposes two exceptions (cash credited to a bank account and claims arising from financial instruments); in these cases, the law of the assigned claim will apply. In addition, for securitisation transactions, the Commission proposes a choice between the law of the habitual residence of the assignor and the law of the assigned claim. This is intended to enable both large and smaller operators to engage in cross-border securitisations.

4. The European Parliament appointed MEP Pavel Svoboda (CZ, EPP), Chair of the Committee on Legal Affairs, as rapporteur. On 12 September 2018, the EP Plenary approved the decision of the JURI Committee to start interinstitutional negotiations on the basis of the Svoboda Report[4] containing 24 amendments to the Commission proposal.

[4] PE621.985v02-00 - A8-0261/2018

5. The European Economic and Social Committee adopted its opinion[5] on this proposal on 11 July 2018 and the European Central Bank delivered its opinion[6] on 18 July 2018.

6. In application of Protocol (No 21) to the Treaties on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, the UK has decided not to opt in to the proposal and Ireland's decision is pending. In application of Protocol (No 22) to the Treaties on the Position of Denmark, Denmark does not take part in the adoption of the proposed measures.

II. WORK IN THE COUNCIL

7. The Working Party on Civil Law Matters (Assignments of Claims) had a first general exchange of views on the proposal and the accompanying Impact Assessment during the Bulgarian Presidency. During the Austrian Presidency, five Working Party meetings have been dedicated to the technical examination of the proposal.

8. The Working Party on Civil Law Matters generally welcomed the proposal and recognised the need to ensure legal certainty in case of cross-border assignments of claims, as this proposal intends to fill a gap in Union law left open by the Rome I Regulation[7]. At the same time, many Member States underlined that the proposal, although at first sight an international private law instrument of limited scope, touched upon securities and financial market law aspects and was thus of a very complex nature. They noted that in-depth analysis of its content and its possible implications was required.

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5 11427/18

6 CON/2018/33

7 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ L 177, 4.7.2008, p. 6–16*.

9. In the course of the Working Party meetings, the Member States actively contributed to help shed light upon the complexities of the proposal by submitting concrete examples which were then discussed with the Commission.

10. On 23 October 2018, the Presidency presented a paper on Articles 1 (Scope), 2 (Definitions), 4 (Applicable law) and 10 (Relationship with other provisions of Union law) as these articles are considered the key elements of the proposal. The discussion on the basis of the Presidency document revealed that further clarifications in the body of the text were necessary with respect to certain definitions and in order to ensure that the proposal did not apply to securities. In addition, the discussion on Article 4 showed that most Member States were not yet ready to express their final position on the core provision of the proposal. While a number of Member States expressed a preliminary tendency to support the general rule as proposed by the Commission, some Member States advocated for the law of the assigned claim as the main connecting factor. In general, the Member States emphasised that a final decision on whether the general rule proposed by the Commission was the most suitable one could only be taken after a thorough examination of the scope of the proposal and of the different types of claims that might be subject to an assignment.

11. After the first examination of the full proposal, the Presidency presented a document[8] containing a series of drafting suggestions to facilitate further discussions on key elements of the proposal, thereby taking into account oral and written contributions by the Member States. The detailed comments from the Member States on the proposal and its Impact Assessment are compiled in separate documents[9].

12. The suggestions for rewording were broadly welcomed as a step in the right direction. Progress could be made on a number of technical issues, such as the relationship between the proposal and the Rome I Regulation and further alignment with that Regulation. There was broad agreement that the position of the debtor should not be affected by the proposal and that this should be expressed more clearly in the text.
A tentative common understanding – without prejudice to the need to revisit some of the details – could be reached on the concept of 'third-party effects', on certain definitions, such as 'assignment', 'claim' or 'habitual residence' and on the use of the principle of universal application. The analysis of Articles 5 (Scope of the applicable law), 9 (States with more than one legal system) and 14 (Application in time) indicates that limited amendments would be necessary in order to clarify these articles and improve their wording.

13. However, the discussions within the Working Party on Civil Law Matters brought to light some issues that need to be clarified before crucial policy decisions can be taken. The complexity of the proposal, its possible impact on financial markets and its interrelation with other pieces of Union law require further examination by legal and financial experts in order to allow Member States to take well-informed decisions.

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8 13936/18

9 11384/18 + ADD1; 13614/18 + ADD1 + ADD 2 + ADD 3; WK 11125/2018 + ADD1 + ADD 2

14. In the light of the above, the main elements on which further negotiations are required and substantial amendments would be appropriate are as follows:

a) Article 1 (Scope) and the list of exclusions from the scope of the Regulation;

b) Article 2 (Definitions), in particular with regard to the definitions of 'credit institution', 'cash' and 'financial instrument';

c) Article 4 (Applicable law): The analysis of the general conflict-of-law rule (habitual residence of the assignor) proposed by the Commission showed that it would be necessary to consider adding more exceptions to it. This may concern, for example, syndicated credit agreements or cases where immovable property is used as collateral in secured lending. It will therefore be essential to identify the appropriate connecting factor depending on the type of claim subject to an assignment. Should the Member States decide to choose the law applicable to the assigned claim as the general rule, certain (other) exceptions would be required, for example in respect of the assignment of multiple and future claims (e.g. under factoring agreements);

d) Article 10 (Relationship with other provisions of Union law): The relationship of this proposal with the Insolvency Regulation[10] and the three Directives on securities (Financial Collateral Directive[11], Final Settlement Directive[12], and Winding-Up Directive[13]) is a complex issue as these four pieces of legislation contain their own conflict-of-law rules. The aim of possible amendments should lie in avoiding any possible overlap or inconsistencies between the conflict-of-law rules of these instruments and the proposal.

III. CONCLUSION

15. While substantial progress has been achieved during the Austrian Presidency, more work will be required to agree on the necessary amendments to the proposal due to its complexity and far-reaching implications.

16. Against this backdrop, the Permanent Representatives Committee is invited to submit this progress report to the Council in order that it takes note of it at its meeting on 6 and 7 December 2018.

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10 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, *OJ L 141, 5.6.2015, p. 19–72.*

11 Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, *OJ L 168, 27.6.2002, p. 43–50.*

12 Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, *OJ L 166, 11.6.1998, p. 45–50.*

13 Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, *OJ L 125, 5.5.2001, p. 15–23.*